



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 17, 2003

Mr. Jaime Esparza
District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Avenue, Room 201
El Paso, Texas 79901

OR2003-1790

Dear Mr. Esparza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177979.

The Office of the District Attorney for the 34th Judicial District (the "district attorney") received a request for information pertaining to cause numbers 990D00249 and 20000D01002. You state that the district attorney's case file pertaining to cause number 990D00249 has been destroyed in accordance with the district attorney's record retention policy. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You state that you have released court-filed documents from the case file pertaining to cause number 20000D01002 to the requestor. See Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (information filed with a court is generally a matter of public record and may not be withheld from disclosure). You also state that you have released basic information from the case file pertaining to cause number 20000D01002 pursuant to section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ refused *n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). You claim that the remaining requested information pertaining to cause number 20000D01002 is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you argue that notes taken by an assistant district attorney contained in the responsive records are "personal notes" and are not public information for purposes

of section 552.021 of the Government Code. Section 552.021 of the Government Code provides for public access to "public information." Section 552.002 defines "public information" as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

This office has additionally observed that certain factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No 635 (1995); *see* Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members public are public information), 450 (1986) (notes of appraisers taken in the course of teacher appraisals were public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam are subject to act). *But see* Open Records Decision Nos. 635 (1995) (calendar purchased and maintained by a commission employee who had sole access to it was not subject to the act), 77 (1975) (personal notes made by individual faculty members for their own use as memory aids were not subject to the act). Based on our review of the submitted information, we conclude that the notes deal with the district attorney's official business. Therefore, we believe that the notes consist of "information that is collected, assembled or maintained under a law or ordinance or in connection with the transaction of official business." *See* Gov't Code § 552.002. Consequently, we conclude that the notes at Tab 7 are public information subject to the Public Information Act.

You contend that the case file pertaining to cause number 20000D01002 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state, and provide documentation showing, that the charges in cause number 20000D01002 were dismissed. You therefore assert that the district attorney's case file pertains to a case that concluded in a final result other than conviction or deferred adjudication. Based on your arguments and our review of the submitted information, we agree that section 552.108(a)(2) generally applies to the case file pertaining to cause number 20000D01002.

We note, however, that section 552.108 protects the governmental body's interests and, consequently, can be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). The requestor contends that the district attorney has waived its claim under section 552.108 here by disclosing the case file to the defendant's prior defense counsel.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) ("[A] due process violation [under *Brady*] has occurred if a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome."). You contend that the district attorney previously disclosed the case file to comply with the constitutional requirements of due process. Accordingly, we find that disclosure to previous defense counsel under these circumstances did not waive the district attorney's claim under section 552.108 of the Government Code. *See* Open Records Decision Nos. 579 at 9 (1990) (exchanging information among litigants in informal discovery is not voluntary release of information for purposes of statutory predecessor to Public Information Act), 454 at 2 (1986) (where governmental body disclosed information because it reasonably concluded it had constitutional obligation to do so, it could still invoke law enforcement exception). We therefore conclude that, with the exception of basic information, you may withhold the case file pertaining to cause number 20000D01002 from disclosure pursuant to section 552.108(a)(2) of the Government Code.¹ We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

¹ Because we are able to make a determination under section 552.108(a)(2), we do not reach your other claimed exceptions to disclosure.

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 177979

Enc: Submitted documents

c: Mr. Charles Louis Roberts
101 South Kansas, 2nd Floor
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(w/o enclosures)